

Service Date: October 30, 2000

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

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IN THE MATTER OF the Application of) UTILITY DIVISION
Citizens Telecommunications Company of Montana)
and CommSouth Companies, Inc., Pursuant to) DOCKET NO. D2000.7.104
Section 252(e) of the Telecommunications Act)
of 1996 for Approval of Their Resale Agreement.) ORDER NO. 6281

FINAL ORDER

Introduction and Procedural Background

1. On February 8, 1996, the Telecommunications Act of 1996 (1996 Act)¹ was signed into law, ushering in a sweeping reform of the telecommunications industry that is intended to bring competition to local exchange markets. The 1996 Act sets forth methods by which local competition may be encouraged in historically monopolistic local exchange markets. The 1996 Act requires companies like Citizens Telecommunications Company of Montana (Citizens) to negotiate agreements with new competitive entrants in their local exchange markets. 47 U.S.C. §§ 251 and 252.

2. Citizens Telecommunications Company of Montana has entered into a resale agreement with CommSouth Companies, Inc. (CommSouth) for resale of Citizens' services according to the 1996 Act. Citizens filed the parties' agreement, entitled "Agreement Between Citizens Telecommunications Company of Montana and CommSouth Companies, Inc." (Agreement) with the Montana Public Service Commission (Commission) on July 17, 2000. The Agreement was docketed as D2000.7.104 and it provides for CommSouth to resell some of Citizens' local exchange services in Montana.

3. On July 20, 2000, the Commission issued a Notice of Application for Approval of Resale Agreement and Opportunity to Intervene and Comment, giving public notice of the

¹ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (to be codified as amended in scattered sections of 47 U.S.C.).

requirements that the Commission approval of the filing be nondiscriminatory toward other telecommunications carriers not parties to the agreement and be consistent with the public interest, convenience and necessity. The notice stated that no public hearing was contemplated unless requested by an interested party by July 31, 2000. The notice further stated that interested persons could submit limited comments on whether the agreement met these requirements no later than August 11, 2000.

4. No hearing has been requested and no comments or requests for intervention received in regard to the Agreement. The application for approval states that the Agreement “is in conformance with prior decisions of this Commission, is in the public interest, and does not discriminate against other telecommunications carriers.” For the reasons explained below, the Commission approves the Agreement in substantial part, but rejects several sections of the Agreement which are not consistent with prior Commission decisions, and/or are not in the public interest.

Applicable Law and Commission Decision

5. The standards for approving an interconnection agreement differ, depending on whether the agreement has been voluntarily negotiated or has been arbitrated by a state commission. 47 U.S.C. § 252(e)(2). The Agreement submitted for approval in this proceeding was negotiated voluntarily by the parties and thus must be reviewed according to the provisions in 47 U.S.C. § 252(e)(2)(A).

6. Section 252(e)(4) of the 1996 Act provides that a negotiated agreement submitted for a state commission's approval must be approved or rejected within 90 days or it will be deemed approved. Thus, Commission approval or rejection according to the substantive standards set forth in the 1996 Act must issue by October 16, 2000, 90 days following the submission of the Citizens Agreement for Commission approval.

7. The Commission must approve or reject the agreement, with written findings as to any deficiencies. 47 U.S.C. § 252(e)(1). Section 252(e)(2)(A) prescribes the grounds for rejection of an agreement reached by voluntary negotiation:

(2) GROUNDS FOR REJECTION.--The State commission may only reject--

(A) an agreement (or any portion thereof)
adopted by negotiation under [47 U.S.C. § 252(a)]
if it finds that

- (i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or
- (ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity;

8. Notwithstanding the limited grounds for rejection in 47 U.S.C. . 252(e)(2)(A), the Commission's authority is preserved in . 252 (e)(3) to establish or enforce other requirements of Montana law in its review of arbitrated or negotiated agreements, including requiring compliance with state telecommunications service quality standards or requirements. Such compliance is subject to . 253 of the 1996 Act, which does not permit states to permit or impose any statutes, regulations, or legal requirements that prohibit or have the effect of prohibiting market entry.

9. Unlike an agreement reached through arbitration, a voluntarily negotiated agreement need not comply with standards set forth in . . 251(b) and (c). Sections 251(b), 252(c) and 252(a)(1) of the Act permit parties to agree to rates, terms and conditions for interconnection that may not be deemed just, reasonable and nondiscriminatory, and which are not consistent with the pricing standards in . 252(c) of the Act, as would be required in the case of arbitrated rates set by the Commission.

10. By approving this Agreement, the Commission does not intend to imply that it approves of all the terms and conditions included in the Agreement and makes no findings herein on the appropriateness of many of the terms and conditions. Our interpretation of the 1996 Act is that . . 252(a) and (c) prevent the Commission from addressing such issues in this proceeding.

11. No comments have been received that express any reservations about the parties' agreement not complying with federal law as cited above or with state telecommunications requirements. The Montana Consumer Counsel, who represents the consumers of the State of Montana, has not intervened in this approval proceeding, and has not filed comments to indicate that any portion of the agreement is not consistent with the public interest, convenience and necessity. There have been no objections raised that the Agreement discriminates improperly or is not consistent with the public interest, convenience and necessity.

12. The Commission finds that the terms in the parties' Agreement appear to conform to the standards required by the 1996 Act and should be approved, with certain

exceptions. In this approval proceeding, the Commission is guided by provisions in state and federal law that have been enacted to encourage the development of competitive telecommunications markets. Section 69-3-802, MCA, for example, states that it is the policy of the State of Montana to encourage competition in the telecommunications industry and to provide for an orderly transition to a competitive market environment.

The Commission addresses the following terms:

13. Service to End Users – Section 3E of the Agreement reads:

An End User may retain its current telephone number, unless the End User has past due charges associated with the Citizens' account for which payment arrangements have not been made. Citizens will not, however, make the End User's previous telephone number available to Reseller until the End User's outstanding balance has been paid.

This provision will have the effect of restricting the movement of customers from one telecommunications provider to another. A similar kind of restriction was addressed by the Commission in In the Matter of the Application of Citizens Telecommunication Company Pursuant to Section 252(e) of the Telecommunications Act of 1996 for Approval of its Resale Agreement with U S WEST Communications, Inc., Docket No. D96.11.191, Order No. 5962a, as follows:

Nonetheless, following an initial review of the agreement, the Commission expressed concern and asked for input from the parties regarding the following contract clause included in both agreements at page 7:

The Parties agree that they will not transfer their respective end user customers whose accounts are in arrears between each other. The Parties further agree that they work cooperatively together to develop the standards and processes applicable to the transfer of such accounts.

Section IV.C.2. The Commission requested that the parties respond to its concern that this clause is not consistent with the public interest, convenience and necessity as required by 47 U.S.C. . 252(e)(2)(A)(ii). The Commission indicated its concern that the customer's ability to change local exchange providers may be improperly and unreasonably restricted by this contract term, noting that there is no explanation of what is meant by "in arrears," there may be impermissible privacy violations resulting

from this term, and that it might be an anticompetitive or an unfair trade practice.

Citizens and U S WEST filed a joint response to the Commission's request, stating their belief that the language is a necessary part of their agreement, attempting to address potential problems with unscrupulous customers who switch providers to avoid having to pay the existing provider's bill. They further stated:

Once a customer switches providers, it will be very difficult for the old provider to collect the unpaid bill. Additionally, a customer leaving behind an unpaid bill is a very high risk customer for the new provider. The parties have not yet been able to design an optimal system which will prevent abuses by the customer while minimizing the amount of actual credit information that is exchanged. That is why the second sentence of the language . . . requires the parties to continue working together to develop standards and processes applicable to the transfer of such accounts. As a reasonable interim measure, the parties agree that the current provider will not transfer a customer if that customer is in arrears. For example, if USWC refuses to transfer a customer to CTC, CTC will know that the customer needs to resolve a bill in arrears, without knowing any of the details of the customer's credit history. In the case of both USWC and CTC, arrears means the customer is in the late stages of a progressive effort to collect on a bad debt.

U S WEST and Citizens contend that the provision promotes the public interest by enabling carriers some means to protect their ability to collect bad debt, thereby preserving the financial health of the parties and keeping rates low for all subscribers by reducing the cost of unpaid debt which ultimately would have to be absorbed by them. They state that it also provides a means to discourage bad faith actions of customers who switch carriers to avoid payment.

MC owner, David Wick, also responded to the Commission's request, stating that the transfer of information relating to customers whose accounts are in arrears is a positive approach to addressing fraud in the competitive market. Mr. Wick stated that, "This is not for the exclusion of any individual requesting service, but rather to help in determining deposit amounts and duration of holding deposits." Mr. Wick

echoed some of the same concerns as U S WEST and Citizens, noting that there is a higher potential for the consumer to abuse the system in the competitive environment. Although this relates to only a small percent of the consumer base, according to Mr. Wick, resale margins are so small to start with and the exchange of basic information is only a means for managing potential losses.

The Commission is sympathetic to the concerns expressed by the parties and recognizes that the competitive local exchange market will likely create opportunities for customers to obtain services from alternate providers even though they may have delinquent accounts with a competitor. This will be a change for the incumbent LEC which has been the only provider of telecommunications service in the past and which still has near total market power, particularly in rural states like Montana. Its credit records will not be complete and it may have to develop new methods to screen new customers. Still, the incumbent LEC will have the benefit of its database records in the case of a reseller to show that service has been recently disconnected at a particular address and this may assist it somewhat in preventing unscrupulous actions by consumers. In the short term, its existing credit records should be reliable and useful for this purpose.

In Montana, regulated telecommunications providers such as U S WEST must provide service to all customers if they meet certain conditions set forth in Commission regulations. In certain instances, U S WEST may request and obtain advance payments, deposits, or other credit guarantees. Resellers are not subject to these credit regulations and they may take steps they deem necessary to prevent uncollectible accounts. As an example, resellers may rely on consumer credit reporting agencies, while the regulated incumbent may not use such reports for serving its residential customers.

The Commission expressed its concern for consumer privacy. Sharing credit information without the knowledge and consent of the customer involved violates the customer's reasonable expectations of privacy and should not be permitted unless there is a compelling reason for such an invasion. The parties have not demonstrated that such a compelling reason exists and that other means of limiting potential losses are unreasonable, or that they may be substantially harmed if they are not permitted to exchange consumer information between them. The Commission further notes that telecommunications providers in the long distance segment of the industry have not been able to engage in the sort of exchange of information which may be permissible under the above-

quoted provision. The privacy rights of consumers and their ability to choose a supplier of telecommunications services may not be trumped by the parties' concerns for uncollectible accounts.

The proposed term would also increase the opportunity for engaging in anticompetitive activity. Specifically, an account that is "in arrears" may be a valued customer who routinely pays bills a little late and has been permitted to do so by the provider. Although the parties stated in their response that this means that a customer is in the last states of a progressive effort to collect on a bad debt, that is not what it says, and in interpreting contract terms, the plain meaning of words used generally prevails. Webster's Ninth New Collegiate Dictionary (1988) defines arrears as "the state of being behind in the discharge of obligations." The Commission finds this term vague and overbroad, with the potential of unreasonably restricting consumer choice as the competitive market develops. Thus, it is not in the public interest.

A further concern is the incumbent LEC's obligation as a carrier of last resort. The incumbent LEC may be required to provide service according to the Commission's regulations, notwithstanding the existence of an account in arrears with another carrier. *See* ARM 38.5.1101, *et seq.* Section 252(e)(3) of the 1996 Act clearly permits the Commission to require regulated incumbents to provide service to residential consumers, notwithstanding other credit problems the consumer may have. *See* ARM 38.5.1104.

14. The Commission finds that this discussion is relevant to section 3E in this Agreement. As with the provision addressed in Order No. 5962a, section 3E will restrict customer choice and hinder the development of a competitive market. Further, it is not clear that such a provision is required as leverage to collect past due accounts. There may be other ways to collect such accounts that do not simultaneously restrict the development of competition or raise other concerns expressed in Order No. 5962a. Section 3E is rejected as not in the public interest.

15. Section 3I reads as follows: "Citizens can refuse to provide service to Reseller when it has reasonable grounds to believe that service will be used in violation of the law." This provision is vague and puts Citizens in the position of determining, based on its judgment, when a violation of law has occurred. This is not good practice, may be anticompetitive, and is rejected as not in the public interest.

16. Citizens Provision of Services to Reseller – Section 4F reads as follows:

Reseller may resell the tariffed retail local exchange services of Citizens subject to the terms and conditions specifically set forth herein and as described in Exhibit A attached hereto. Notwithstanding the foregoing, the following are not available for purchase: grandfathered services; promotional and trial retail service offerings of less than ninety (90) days duration; lifeline and linkup services; contract service arrangements; installment billing options; 911 and E911 services; interconnection services; legislatively or administratively mandated specialized discounts (e.g., educational institution discount) and discounted services to meet competitive situations.

The Commission rejects the last clause of this section which reads "and discounted services to meet competitive situations." This may stifle competition by essentially reducing the number of customers for which a reseller can compete. This is not in the public interest.

17. Establishment of Service – Section 6E reads as follows:

Citizens will require Reseller to obtain a Letter of Authorization ("LOA") signed by the End User prior to converting an existing service for such End User with Reseller. The Local Service Request ("LSR") will contain a notation that the LOA has been obtained, as well as the name of the end User that has signed the LOA. The LOA will be maintained in a file in electronic format at the Reseller's premises, and will be available for inspection at Citizens' request.

This section is rejected as not permitting all the methods for confirming customer change contemplated by Montana and federal law. Citizens and CommSouth can review that law and resubmit amended provisions if they wish. The Commission has noted that provisions in interconnection agreements that are in conflict with the law, whether or not specifically addressed by the Commission, are rejected as a matter of law and not in the public interest. See, e.g., In the Matter of the Application of McLeodUSA Telecommunications, Inc. and U S WEST Communications, Inc. Pursuant to Section 252(e) of the Telecommunications Act of 1996 for Approval of Their Resale Agreement, Docket No. D99.11.252, Order No. 6230, p. 8.

18. Discontinuance of Service to Reseller – Section 9f reads as follows:

Where Reseller discontinues its provision of service to all or substantially all of its End Users, the Reseller must send advance written notice of such discontinuance to Citizens and to each of the Reseller's End Users. Such notice must include a verification that the Reseller has notified its End Users of the discontinuance, and must state the date on

which such end user notice was mailed. If the End User fails to make other arrangements within fifteen (15) days of the date of notice provided by the Reseller, Citizens will continue to serve the End User at its retail rates.

This provision is rejected for two reasons: 1) a reseller must provide at least 30 days notice to the Commission of the intent to discontinue service "to all or substantially all" of its customers; and 2) this provision may not be consistent with the Montana slamming laws cited above.

Conclusions of Law

1. The Commission has authority to supervise, regulate and control public utilities. Section 69-3-102, MCA. Citizens is a public utility offering regulated telecommunications services in the State of Montana. Section 69-3-101, MCA.

2. CommSouth intends to resell telecommunications services and interconnect with Citizens in Citizens' territories throughout Montana. As a reseller of regulated telecommunications services in Montana, CommSouth is subject to Commission authority to supervise, regulate and control public utilities. Section 69-3-803(6), MCA.

3. Before providing services in Montana, CommSouth initially will be required to register with the Commission as a telecommunications provider and to provide the requested information to the Commission, if it has not already done so. Section 69-3-805, MCA. The requirement at § 69-3-805(1)(e) has been waived by the Commission.

4. The Commission has authority to do all things necessary and convenient in the exercise of the powers granted to it by the Montana Legislature and to regulate the mode and manner of all investigations and hearings of public utilities and other parties before it. Section 69-3-103, MCA.

5. The United States Congress enacted the Telecommunications Act of 1996 to encourage competition in the telecommunications industry. Congress gave responsibility for much of the implementation of the 1996 Act to the states, to be handled by the state agency with regulatory control over telecommunications carriers. *See generally*, the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (*amending scattered sections of the Communications Act of 1934*, 47 U.S.C. . . . 151, *et seq.*). The Montana Public Service Commission is the state

agency charged with regulating telecommunications carriers in Montana and properly exercises jurisdiction in this Docket pursuant to Title 69, Chapter 3, MCA.

6. Adequate public notice and an opportunity to be heard has been provided to all interested parties in this Docket, as required by the Montana Administrative Procedure Act, Title 2, Chapter 4, MCA.

7. The Commission has jurisdiction to approve the resale agreement negotiated by the parties and submitted to the Commission for approval according to . 252(e)(2)(A). Section 69-3-103, MCA.

8. Approval of interconnection agreements by the Commission is subject to the requirements of federal law as set forth in 47 U.S.C. . 252. Section 252(e) limits the Commission's review of a negotiated agreement to the standards set forth therein for rejection of such agreements. Section 252(e)(4) requires the Commission to approve or reject the CommSouth Agreement October 16, 2000, or the Agreement will be deemed approved.

Order

THEREFORE, based upon the foregoing, it is ORDERED that the resale agreement of the parties, submitted to this Commission for approval pursuant to the 1996 Act, is approved, except that the following provisions are rejected as discussed above: 3E, 3I, 4F, 6E and 9F.

1. The parties shall file an amendment to this agreement consistent with this Order within 30 days.

2. The parties shall file all subsequent amendments to the Agreement with the Commission for approval pursuant to the 1996 Act.

DONE AND DATED this 16th day of October, 2000, by a vote of 4 to 0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

DAVE FISHER, Chairman

NANCY MCCAFFREE, Vice Chair

GARY FELAND, Commissioner

BOB ROWE, Commissioner

ATTEST:

Kathlene M. Anderson
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision.
A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.